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***VIA FACSIMILE AND REGULAR MAIL (210) 545-4329***

Mr. Richard Garcia  
Region 13 Director  
Texas Commission on Environmental Quality  
14250 Judson Rd.  
San Antonio, TX 78233-4480

Dear Mr. Garcia:

Re: Proposed Vulcan Construction Materials Quarry, Quihi, Medina County, Texas—  
Proposed Water Pollution Abatement Plan (WPAP)

This letter will serve as additional formal comments for the record by the Medina County Environmental Action Association (MCEAA) and its members, regarding the above-referenced proposed WPAP plan. MCEAA's members own property and live immediately adjacent to the proposed quarry site and their water supply and other property will be directly and uniquely affected by the content and enforceability of the proposed WPAP. Comments made by MCEAA and its members in other letters regarding this proposal are incorporated into this letter by reference.

The letter will cover deficiencies in the plan as currently proposed, as they relate to legal obligations of Texas Commission on Environmental Quality (TCEQ) and Edwards Aquifer Authority (EAA) under applicable law. For the reasons given in this letter, we urge a finding of deficiency by the Executive Director in this proposed plan, and your recommendation to him to that effect.

## I. INTRODUCTION

Except in compliance with certain provisions, the Clean Water Act prohibits the discharge of pollutants into the waters of the United States. 33 U.S.C. § 1311(a). Pursuant to section 402 of the Clean Water Act, states may issue permits for the discharge of pollutants in accordance with National Pollutant Discharge Elimination System ("NPDES"). 33 U.S.C. § 1342(a) and (b). States may issue "general" NPDES permits to sources within a geographical area, to sources with the same category of discharges, or to sources that share a category of water quality-based limits. If a source falls within a category that has an existing general permit, it must apply to be "assigned" to the general permit.

In Texas, quarry dischargers of storm water from new construction must receive coverage under the TCEQ issued TXR150000 TPDES general permit. Quarry operations are subject to the multisector TPDES general permit TXR050000. To our knowledge, Vulcan has not yet submitted a notice of intent (NOI) or Stormwater Pollution Prevention Plan (SWP3) for those permits.

Quarry construction and operation activities in Texas that exceed certain thresholds and occur over the Edwards Aquifer must submit an Edwards Aquifer Protection Plan that complies with 30 TAC § 213.5. In this case, the applicable plan is the WPAP. This is the proposed plan Vulcan has submitted to the agency for review.

These comments apply to the proposed WPAP and (1) any future reliance by Vulcan on the proposed WPAP to satisfy SWP3 or other TPDES stormwater permitting requirements; (2) any future reliance by Vulcan on the proposed WPAP to satisfy NEPA obligations in federal proceedings; (3) any representations by Vulcan to the Edwards Aquifer Authority (EAA) based on the proposed WPAP.

To the extent that Vulcan relies on the proposed WPAP to serve as its SWP3 in a TPDES permit, the SWP3 will suffer from the same defects.

Further, the multisector general permit, TXR050000, is currently being revised by TCEQ and has been sent out for public comment. It is possible that Vulcan will have to revise its proposed WPAP prior to or after the adoption of the general permit, which creates a timing issue. To the extent Vulcan will rely on its WPAP to satisfy the general permit, the WPAP should contain all measures necessary to comply with any new requirements, including revisions to the annual discharge monitoring report requirements to require public reporting of results of compliance with numeric effluent limits. This is particularly true for all requirements that could be construed as existing requirements of the federal Clean Water Act itself, as opposed to any new state rule by TCEQ recognizing such requirements at this time.

## II. DISCUSSION OF THE ISSUES

This case has been marked by Vulcan's complete and total failure to consider the total impact of its proposed undertaking.

The proposed 1,780-acre quarry will remove *an average* of 5 million tons of aggregate per year over 50 years, making one of the largest if not the largest quarry in Texas. It is likewise one of the largest if not the largest single industrial operation proposed over the Edwards Aquifer recharge zone since the creation of the Edwards Aquifer Authority in 1995.

To date, Vulcan's approach has been to compartmentalize and segment the analysis of impacts from this project as much as state and federal agencies will allow. At the federal Surface Transportation Board (STB), where Vulcan seeks a rail license for a proposed rail line that will solely serve the proposed quarry, Vulcan has denied that the obvious—indeed, physical—connection between the quarry and the rail line, and the lack of independent utility for the rail line in the quarry's absence, merits their combined analysis in a single environmental impact statement. Because the state agencies (TCEQ and EAA) are not presently real participants in that federal process, numerous direct and cumulative impacts of the quarry and rail line, including interrelated impacts on (A) water quantity, (B) water quality, and (C) flooding, are being swept under the rug in a conclusory fashion to avoid public scrutiny.

We note also that while the TCEQ and EAA seem to believe that they will have jurisdiction over construction of the rail line, at least for stormwater permitting and any other potential water quality and/or wetland (401 certification) purposes, Vulcan has argued before the STB to preempt that jurisdiction. While we obviously disagree with the scope of Vulcan's position, the important point for state agencies is that any post-STB licensing assertion of state authority that even tangentially implicates the rail line will be contested by Vulcan.

It is bad enough that, as discussed below, we currently have a piecemealed state quarry permitting process,<sup>1</sup> where Vulcan:

1. Divided up the WPAP into the quarry pit (no analysis; conclusory assertion of no impact) and plant site (discussed in a vacuum);
2. Has not even applied for the quarry TPDES stormwater permit;

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<sup>1</sup> Cf. TEX. WATER CODE § 26.553 (adopted June 17, 2005) (creating integrated water quality permitting and oversight pilot program among several state agencies only for certain quarries in the John Graves Scenic Riverway basin). Section 26.553 also provides for financial guarantees of future water quality (and quantity) in the John Graves Riverway area by the permittee, through bond requirements. We note that Vulcan has seen fit negotiate such guarantees in other locations, such as Nokesville, Virginia, but will not do so here. We also believe that several of the requirements in § 26.553 are arguably already required by the federal Clean Water Act even though TCEQ does not otherwise require them in stormwater permits.

3. Has not even disclosed the water quantity it needs to control dust and wash aggregate in the air permit, which is the primary input to the WPAP analysis they ostensibly did conduct for the plant site;
4. Has not even disclosed that dust control with water will need to occur elsewhere in the quarry to support air modeling results;
5. Has not even applied for the water rights necessary to support its proposed air permit;
6. Has no idea how its massive water use will affect existing wells and spring and streamflow;
7. Has no idea how its blasting and mining through recharge features will affect existing wells and spring and streamflow, and has not obtained a TCEQ blasting permit, whatever isolated vacuum analysis that entails;
8. Has no idea what effect the use of settling ponds for all drainage from the plant site, including wash and dust control water, will have on water quality;
9. Apparently plans to have all 115 employees use portable toilets, because potable and sanitary facility water supply and discharge is not accounted for;
10. Has no idea what the likely significant contribution of the quarry pit is to downstream spring and stream flows, based on a conclusory assertion that surface flows would remain in the pit behind a berm, without support for that statement and without any analysis of infiltration and subsequent downgradient outflow.

But no, that's not bad or Kafkaesque enough. In addition, we have the federal process, where we should have all of this information disclosed in single document (the EIS) available to inform decisionmakers at all levels, and where instead we have Vulcan:

1. First arguing that it has no responsibility at all to analyze cumulative impacts from the quarry;
2. Subsequently pretending that the rail line, which it wholly owns and which will serve only its facility, is a common carrier;
3. Concurrently pretending that, after six years of going nowhere on this proposal, it could open the quarry to be served only by trucks;
4. Maintaining that point 3 would obviate the designation of its proposal as a connected action, thus not requiring a comprehensive EIS analyzing direct

and cumulative impacts from the real “major federal action,” a quarry and a rail line;

5. Submitting a Draft EIS which contains the absurd unsupported conclusory statement “vibration impacts to groundwater wells will occur from the quarry and from the rail line, but they will not overlap,” not only lacking a vibration analysis, but without identifying any of the well locations either;
6. Submitting a Draft EIS which found flood impacts at the rail line’s proposed trestle bridge stream crossings (designated in the record at the time only as to general location, not even design) to be significant, but then undertook no analysis of the quarry’s contribution, and deemed the berms (which are solid) immediately adjacent to the bridges (which have at least some opening) to have no impact on hydrology whatsoever, in the absence of any hydrologic modeling;
7. Submitting historical studies for the area south of the quarry—which contains several register properties, dozens of candidate properties recorded by the Texas Historical Commission, which and has been designated by Preservation Texas as one of the most at risk in the state—with no connection whatsoever to flooding or vibration analysis and no discussion of how that might affect the ongoing use and viability of those properties;
8. Failing to disclose any of the information necessary to support the “state-level” permit applications.

In short, if this proposal is delayed for months, years, or decades, or never happens, no one at the agency should shed any tears. The community is solidly opposed to it. Public meetings in the STB process, at Commissioners Court, and for the TCEQ air permit have exceeded 200 persons in attendance, most opposed to the proposal. Vulcan has had six years to make an integrated presentation in a single document to decisionmakers and the public and has chosen instead to cut corners and attempt grudging, pro forma, and minimal compliance with disclosure requirements. The STB has issued two supplemental information requests following Vulcan’s submission of the Draft Environmental Impact Statement, and last month determined that a Supplemental Environmental Impact Statement was required to analyze additional feasible rail routes.

As discussed further in the Water Pollution section, Vulcan’s substantive attempt to mitigate in accordance with a BMP checklist really isn’t the issue here.<sup>2</sup> The issue is the procedural problem, and resulting legal problems, that result when a project of this magnitude attempts to segment and piecemeal analysis. Each agency (TCEQ, EAA, STB) is missing relevant factors in its analysis, whether it is the quantity of water to be withdrawn, used and discharged; sources of runoff or infiltration that were not

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<sup>2</sup> As discussed further below, the failure to consider relevant factors makes this in no way a concession that Vulcan’s WPAP somehow satisfies these BMPs.

considered; or impacts to hydrology, such as berms, rail bridges, and impervious cover, that are not discussed with reference to how the project has actually been proposed to other agencies. Analysis in isolation creates legal problems, and it is TCEQ and EAA's duty to withhold approval of state authorization until these problems are resolved through disclosures on the record.

#### A. Water Quantity

Vulcan has applied to TCEQ for proposed air permit #76337, currently pending, which relies exclusively on vast water quantities to (1) wash the aggregate in order to meet air permit assumptions regarding the quality of stone to be processed and (2) control dust during processing by maintaining an assumed—but unverifiable—moisture content.

Vulcan is currently permitted by the EAA to use 740 gallons of water per ton of aggregate processed at its Loop 1604 quarry in San Antonio. Vulcan maintains that it uses less than this amount because it recycles some of the water. However, Vulcan refuses to disclose the actual quantity used at Loop 1604 on the grounds that it is proprietary data. For different, unknown reasons, Vulcan also refuses to disclose the actual quantity of water projected for use at the proposed quarry, despite reliance on that figure as the exclusive Best Available Control Technology (BACT) in the air permit. Even if Vulcan uses only 200 gallons of water per ton, it will still use 3,100 acre-feet of water in an average year, greater than all of the cities in Medina County (Castroville, Devine, and Hondo) combined. Vulcan's public statement, in response to these figures, that it would use only 2,500 acre-feet per year, is false and unsupported.

To obtain the water quantities necessary to support the air permit, Vulcan must obtain an approved transfer of existing groundwater pumping rights or apply for pumping rights from the EAA.

Obtaining water quantities, in turn, impacts other private wells in the area (including three on the quarry site which Vulcan claims landowners will continue to use), and downgradient streamflow and artesian spring flow. It is well known that the recharge zone of the highly transmissive aquifer supports artesian spring and streamflow downgradient. In fact, in order to maintain spring flow in compliance with the Endangered Species Act, pumping in the "San Antonio" pool of the Edwards Aquifer, which includes the entirety of this quarry-rail project, is now capped at 450,000 acre-feet per year.

Indeed, though it has not yet sought coverage under a TPDES stormwater permit, Vulcan concedes federal Clean Water Act jurisdiction by applying for the WPAP. The purpose of the WPAP is

[T]o regulate activities having the potential for polluting the Edwards Aquifer and hydrologically connected surface streams in order to protect existing and potential uses of groundwater and maintain Texas Surface

Water Quality Standards. The activities addressed are those that pose a threat to water quality.

30 TAC § 213.1. In the case of this quarry-rail project, that would include hydrologically connected streamflow and existing artesian springs downgradient in the Elm and Quihi basins, including Quihi Lake. Because Vulcan has conceded jurisdiction by applying for WPAP approval, the burden is on Vulcan to show, if it disagrees with the applicability of any of the water quality arguments below, that there is no set of circumstances in which such hydrologic connections are present. Given that such connections are plainly visible from the windshield of a vehicle today, even in the midst of the current drought, Vulcan cannot overcome this burden.

The air permit mentions nothing of water quantity, which creates its own set of problems, including statutory and regulatory compliance with specific air quality laws, as well as the general authority of the agency to issue a permit in exclusive reliance on an indeterminate and undisclosed factor. The air permit represents a state agency failure to account for a relevant factor not only in its own air permitting process, but in the water pollution abatement plan as well. The EAA should not compound this failure by allowing the WPAP to proceed without an accurate and complete water balance.

## B. Water Pollution

The question in reviewing the proposed WPAP is not whether Vulcan complied, in a checklist fashion, with the Best Management Practices (BMPs) called for in 30 TAC § 213.5.

Rather, the question is whether all relevant factors have been considered sufficiently for the agency to make a rational decision. Conclusory projections of compliance with the BMPs are irrelevant if the factors necessary to guarantee compliance are absent, or if a relevant factor affecting future compliance has not been considered.

### 1. Direct Impacts to the Aquifer

The proposed quarry is located almost entirely over the Edwards Aquifer Recharge Zone. According to data contained in the WPAP, there are five major fault lines, forty-three karstification features, two caves, nine solution cavities, one sinkhole and twenty-seven solution-enlarged fractures. These are all recharge features of the aquifer, which Vulcan admits in the WPAP that it will blast and mine through now that it has disclosed them. Contamination entering these features through blasting, mining, and runoff is highly likely to be directly transmitted to the waters of the aquifer and to spring and streamflow. It has not been accounted for.

Three wells are also noted in the quarry. Vulcan says these wells are to be left in service for quarry-land owners. Previous correspondence from Edwards Aquifer Authority stated all wells should be identified and plugged if not in use. Will EAA now enforce its prior statement?

The WPAP is further deficient in that quarrying will occur to an indeterminate depth. The WPAP contains neither monitoring provisions nor any enforceable guarantee by Vulcan to quarry only to a certain depth. Nor does the WPAP detail how or whether the recharge features will be sealed.

## 2. The WPAP Fails to Account for Any Impacts Due to Quarry Pit Excavation and Operation

Further, the WPAP fails to account for any direct impacts to the aquifer or spring and streamflow from activities within the quarry pit. Essentially, the WPAP divides the quarry site into two parts: the quarry pit where mining will occur, and the quarry plant where rock crushing, storage, loading, and transport will occur.

The WPAP states, without analysis, that surface waters from the quarry pit will be cut off from the plant area and creeks and tributaries that flow through the property. There is no discussion of the timing of when this will occur, how it will be dealt with on an interim basis, or whether the proposed measures will actually succeed at zeroing out the discharge.

1. What is the actual basis of Vulcan's statement that flooding will be contained, other than a conclusory assertion?
2. What guarantee is there in applicable state law, or the proposed WPAP, or other storm water plan itself, that would mandate Vulcan to design the quarry [up gradient of the plant site] in a manner that would support its conclusory assertion as proposed and result in zero flood impact?
3. Assuming that design of the quarry itself is the basis for Vulcan's conclusory assertions regarding flooding, to what extent are those designs legally enforceable and binding on Vulcan?

The WPAP says nothing about infiltration impacts to the aquifer from these waters given the geologic features identified on site. More significantly, the WPAP does not consider the impact of this infiltration on downgradient spring and streamflow. The runoff from the intensive mining activities in the quarry pit, the WPAP assumes, will somehow not exhibit any trace of oil, nitrates (from explosives), and other pollutants that it will pick up from the quarry pit. It is clear that runoff from the quarry once mining begins will be different from the runoff that existed before, both in quantity and quality.

We remind the TCEQ that Vulcan has conceded federal Clean Water Act jurisdiction by applying for WPAP approval. A hydrologic connection exists between the area over the recharge zone (which Vulcan proposes to mine) and surface water features. Yet the WPAP fails entirely to consider, over the vast majority of the quarry site, any runoff impact from infiltration and subsequent outflow.



Further, though Vulcan says that the surface runoff will be cut off from any stream, there are drainage features proposed in the WPAP for the area north of the processing plant area.

### 3. Flow and Infiltration from Settling Ponds

Though Vulcan does not propose any retention basins for flood flows in the WPAP, it does propose five settling ponds, at least two of which will ultimately recycle wash and dust control water from the plant site, and at least two of which will finally discharge into the aquifer through “evaporation” (read: infiltration), or directly to streams via overflow during heavy rains (the settling ponds are designed with weirs for this purpose).

The infiltration from reuse water flowing into the two ponds that finally discharge will contain concentrations of organic and nitrate pollutants and particulate matter. This material is not known to be readily filtered out by the recharge zone. In fact, most studies indicate that the recharge zone is a rather poor filter even for turbidity. The WPAP does not state what will happen to this water or what the implications of its discharge are, other than it will leave the ponds in some manner. As a result, the WPAP has not fully considered the impact of the reuse water and mixed runoff in the settling ponds.

### 4. The WPAP defers analysis on facilities that are reasonably foreseeable

The WPAP contains no evidence of any water quantities obtained for and discharged by the employees at the quarry. This includes potable water and water for restroom facilities. Deferring analysis on reasonably foreseeable water use and discharge is improper and should not be permitted.

## C. Flooding

As noted above, the WPAP states no relevant inputs into a flood study. Water will flow downgradient through the quarry site as it always has, only now in greater peak flow volumes carrying higher concentrations of pollutants. Cumulative impacts on flooding due to rail structures, which were assumed as air pollution sources in the air permit *but were not assumed as modifications to hydrology in the WPAP*, are also absent.

While flooding is not the direct concern of the WPAP or other stormwater programs, the failure to report these values calls into question the overall validity of the runoff assumptions from the parts of the quarry (plant site) that were analyzed, and of course calls into even greater question the assumptions behind those parts of the quarry (mining pit) that were not. If, at the end of the day, a reader of the WPAP for a project of this magnitude cannot determine how much peak flow and average flow is going to be discharged from the entire quarry site, beyond the rail crossing at the south boundary, either through overland flow or infiltration, then how much water pollution abatement does this plan truly provide?

The answer to that question cannot be determined from the present WPAP proposal for this project. Clear interrelationships exist between water quantity withdrawn and used at the site, water quality downgradient, and water quantity, in the form of peak and average flows, exiting the quarry site and rail loop during rainfall events. The proposed WPAP does not fully and adequately disclose these relationships and thus cannot correctly apply applicable BMP parameters and other legal requirements.

Mitigation to avoid disclosure is not an acceptable strategy, when it is obvious that the relevant factors may greatly affect the design, operation, and mitigation of this massive proposed facility. Further, we have reiterated to Vulcan and the agencies that after six years, “because we don’t have to” is no longer an acceptable strategy. We need to be moving toward a more integrated approach that breaks down the artificial wall between water quantity, water quality, and flooding, or the procedural legal hurdles to this project are going to continue to increase.

On the basis of its comments above and separately filed, MCEAA hereby requests a contested case hearing on this matter.

Very truly yours,

**THE GARDNER LAW FIRM**  
A Professional Corporation



David F. Barton

cc.

Robert Potts, General Manager, Edwards Aquifer Authority  
Rini Ghosh, U.S. Surface Transportation Board